(2016) 03 GUJ CK 0102

In the Gujarat High Court

Case No : Special Civil Application No. 19661 of 2015

Prakhar Estates Private Limited APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, Section 11E
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 142

Citation : (2016) 03 GUJ CK 0102

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Devan Parikh, Senior Advocate and S.N. Thakkar, Advocate, for the Appellant; R.J. Oza, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.—1. Rule. Mr. R.J. Oza, learned senior standing counsel waives service of notice of rule on behalf of the respondents No. 1 to 3 and Mr. Chinmay Gandhi, learned advocate waives service of notice of rule on behalf of the respondent No. 4. With the consent of the learned advocates for the respective parties, the matter is taken up for final hearing today.

2. By this petition under Article 226 of the Constitution of India, the petitioner seeks the following substantive reliefs:--

"8. The petitioner therefore, prays that:--

(A) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus, a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the attachment notice dated 11.12.2013, the letter dated 20.05.2014 and the order dated 01.09.2015 at ANNEXURE J (Colly), and Annexures H respectively;

(B) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus, or any other appropriate writ, order or direction directing the respondent No. 4-Corporation to effect the change in the constitution of Board of Directors of the petitioner company as sought for by the petitioner company, without insisting for compliance with the condition of obtaining NOC from the Central Excise Department;"

3. The facts, as emerging from the averments made in the petition, are that pursuant to an application made on 29.6.1990 by one Tehelram Thakordas Arora for allotment of Plot No. 821 in the Sachin Industrial Area consisting of Revenue Survey No. 299 within the village limits of Talangpore, Taluka Choryasi, District Surat admeasuring 4816 square metres, the Gujarat Industrial Development Corporation (GIDC) executed a registered lease deed in his favour for a period of ninety nine years commencing from 5.4.1988 till 4.4.2087, which was duly registered with the office of the Sub-Registrar of Assurances, Surat at Serial No. 4748. On 1.8.2007, a registered deed of assignment came to be executed between Tehelram Thakordas Arora and the petitioner company (through one of its Directors Mr. Arun Gupta) for transfer and assignment of the leasehold rights in the lease deed dated 29.6.1990 subject to the terms and conditions mentioned therein. The said deed of assignment came to be duly registered at Serial No. 15519 with the Sub- Registrar of Assurances.

3.1 Pursuant to an application made by Tehelram Thakordas Arora seeking transfer of plot No. 821 in favour of the petitioner company, the competent authority of the GIDC (the fourth respondent herein) by an order dated 13.2.2013 granted such permission. It is the case of the petitioner that pursuant to the order dated 13.2.2013, the petitioner company vide letter dated 6.3.2013 furnished the required documents to GIDC along with the requisite transfer fees. After due scrutiny of all the documents on record, GIDC vide its final order dated 13.3.2013 transferred the said plot No. 821 in favour of the petitioner company for the purpose of carrying out the activity of manufacturing textiles, effective from the said date.

3.2 However, since subsequently a new group of Directors was, pursuant to negotiations entered into with the erstwhile group of Directors, inclined to take over the ownership and management of the petitioner company, an MOU dated 14.5.2015 came to be entered into between the existing Board of Directors and the new Board of Directors. On 27.5.2015, a letter was jointly written by the petitioner company (through its Directors Pradipkumar Agrawal and Jagdeepkumar Agrawal as transferors) and the petitioner company (through its Directors Bhupen Mahendra Shah and Neetaben Bhupen Shah) seeking transfer of Plot No. 821 in the names of the Directors of the new company and since the petitioner company was inclined to change its existing business from textile industry to manufacture of dyes and intermediate industries. In response to the said application of the petitioner company, the fourth respondent vide its letter dated 1.9.2015 granted the said permission as requested for, subject to the conditions mentioned therein which included a condition of production of NOC of the Central Excise Department. In view of the above condition stipulated by the fourth respondent, the petitioner company made a request to the second respondent for grant of NOC for change of Directors of the petitioner company in the record of the GIDC. However, since there was no response thereto, the petitioner personally met the officers of the respondents No. 2 and 3 requesting for issuance of NOC. However, the petitioner was orally informed by the officers of the Central Excise Department that the NOC as prayed for cannot be granted since there are some dues outstanding of one M/s. Mahalaxmi Processors which was operating a unit of manufacture of textiles from the said plot as a 100% Export Oriented Unit (EOU) and since the demands raised under the Central Excise Act have not been cleared by the said M/s. Mahalaxmi Processors, an attachment notice dated 11.12.2013 has also been issued against the said manufacturer viz., M/s. Mahalaxmi Processors under the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 and that vide letter dated 20.5.2014, the Superintendent of Central Excise, Surat had requested the Regional Manager, GIDC not to change the ownership of the said premises in any other name unless a "No Objection Certificate" is issued by the said office. Since the GIDC was not ready and willing to make any entry in the record in respect of change of ownership by way of change of Directors of the petitioner company and change of business of the petitioner company till NOC is issued by the Central Excise Department and on the other hand, the respondents No. 2 and 3 have refused to either grant the application for issuance of NOC and/ or reject the said application, the petitioner has filed the present petition.

4. Mr. Devan Parikh, senior advocate, learned counsel with Mr. S.N. Thakkar, learned advocate for the petitioner, invited the attention of the court to the notice of demand to defaulter dated 11.12.2013 to point out that the said notice has been issued in respect of dues which had crystallized way back in the years 2003 to 2008. It was submitted that no action has been taken by the respondents to recover such dues at the relevant time and that it is only as late as in the year 2013 that the said notice came to be issued. Reliance was placed upon the decision of this court in the case of Valley Velvet Private Limited v. Union of India, , 2006 (2) GLR 1373 for the proposition that when no time limit is prescribed for exercise of powers under the statute, it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. It was submitted that, therefore, the action of the respondents in seeking to recover the dues of M/s. Mahalaxmi Processors from the plot in question is barred by limitation.

4.1 Reference was made to the lease deed dated 21.6.1999 executed between M/ s. Amitex Silk Mills Private Limited and M/s. Mahalaxmi Processors to point out that there is nothing on record to show that M/s. Amitex Silk Mills Private Limited was ever the owner of plot No. 821, GIDC. It was submitted that the lease deed dated 21.6.1999 executed between the above referred parties is, therefore, of no consequence and that the respondents cannot place reliance upon any such lease deed. It was submitted that the petitioner has purchased the plot in question from Shri Tehelram Thakordas Arora and that the transfer has been duly registered by the GIDC. It was submitted that the transfer in favour of the petitioner was made in August, 2007 whereafter, Shri Tehelram Thakordas Arora ceased to have any interest in the said property. It was submitted that, therefore, on the date when the notice of attachment to the defaulter came to be issued on 11.12.2013, the property was already vested in the petitioner company and Shri Tehelram Thakordas Arora had no interest in the said property. It was submitted that in any case M/s. Mahalaxmi Processors had no interest in the said property and hence, GIDC cannot refuse to register the transfer.

4.2 Mr. Parikh drew the attention of the court to the provisions of section 11 of the Central Excise Act, 1944 (hereinafter referred to as "the Act") to point out that the respondents have no authority to resort to the provisions of section 11 of the Act qua the petitioner, inasmuch as, the petitioner has purchased the plot in question from Shri Tehelram Thakordas Arora and not from M/s. Mahalaxmi Processors. Besides, the proviso to section 11 of the Act envisages transfer of business of the trader either in whole or in part, whereas it is not the case of the respondents that the petitioner has purchased the business as a going concern from M/s. Mahalaxmi Processors. It was submitted that under the circumstances, the liabilities of M/s. Mahalaxmi Processors cannot be foisted upon the petitioner.

4.3 Reference was made to the provisions of section 11E of the Act which provides for creating a first charge on the property of an assessee or person in respect of any amount of duty, penalty, interest, or any other sum payable by the assessee or other person. Reliance was also placed upon the decision of this court in Bhavani Corporation v. Assistant Commissioner, Central Excise Division II, 2014 SCC OnLine Guj 11591, for the proposition that if as on the date when section 11E of the Act was brought on the statute book, the subject property was no longer of the ownership of the defaulting assessee, the question of creating the first charge on such property would not arise. It was submitted that section 11E of the Central Excise Act was brought on the statute book with effect from 8.4.2011 whereas the subject property was transferred in favour of the petitioner in the year 2007, much before the coming into force of section 11E of the Act and hence, the said provision would have no applicability to the facts of the present case.

4.4 In conclusion, the learned counsel contended that since at no point of time M/s. Mahalaxmi Processors had any right, title or interest in the subject plot, the respondent Central Excise authorities are not justified in calling upon the GIDC to require the petitioner to obtain a "No Objection Certificate" from the said Department for transfer of the subject plot. It was, accordingly, urged that the petition deserves to be allowed by granting the reliefs as prayed for.

5. Opposing the petition, Mr. R.J. Oza, learned senior standing counsel for the respondents No. 1 to 3, invited the attention of the court to the impugned notice dated 11.12.2013 to submit that such notice has been issued to M/s. Mahalaxmi Processors and hence, the petitioner has no locus to challenge the same. It was

submitted that as on the date when the notice came to be issued, liabilities to the extent of Rs. 1,87,05,178/- had crystallised against M/s. Mahalaxmi Processors. It was submitted that by the impugned communication dated 20.5.2014 the Superintendent of Central Excise has merely informed the fourth respondent GIDC not to change the ownership of the premises unless a "No Objection Certificate" has been issued by the office to enable the office to recover huge government dues outstanding against M/s. Mahalaxmi Processors. The attention of the court was invited to the lease deed dated 21.6.1999 executed by and between M/s. Amitex Silk Mills Limited and M/s. Mahalaxmi Processors to point out that M/s. Amitex Silk Mills Ltd. had given the subject premises on lease to M/s. Mahalaxmi Processors as per the terms and conditions recorded therein. Reference was made to the statement under section 302(2) of the Companies Act, 1956 (Annexure R-2 to the affidavit in reply of the respondent) to point out that Shri Tehelram Thakordas Arora was closely related to the Directors of M/s. Amitex Silk Mills Private Limited and was also one of the Directors. It was submitted that, therefore, the contention that M/s. Amitex Silk Mills Private Limited had no interest in the property in question is, therefore, without any basis. It was submitted that M/s. Mahalaxmi Processors carried on activities on the subject plot and did not comply with the export obligations and huge recoveries, as referred hereinabove, are due from it. It was submitted that the respondents are, therefore, justified in calling upon the GIDC not to grant permission to transfer the said plot on which M/s. Mahalaxmi Processors had carried on activities and GIDC has rightly not granted the permission to change the leasehold rights in respect of the subject land. It was, accordingly, urged that the petition being devoid of merits deserves to be dismissed.

6. A perusal of the record of the case reveals that a lease deed dated 29.6.1990 came to be executed by GIDC in favour of one Shri Tehelram Thakordas Arora in respect of plot No. 821 at Sachin Industrial Area. Subsequently, by a Deed of Assignment dated 1.8.2007 Shri Tehelram Thakordas Arora transferred the plot in question in favour of the petitioner Prakhar Estates Private Limited. Subsequent thereto, GIDC granted permission to Shri Tehelram Thakordas Arora to transfer the property in question in favour of the petitioner. Thus, the property stood transferred in favour of the petitioner. Subsequently, in view of the fact that the Board of Directors of the petitioner company underwent a change, the names of the new Directors were required to be registered by the GIDC. However, GIDC in view of the communication dated 20.5.2014 of the Superintendent of Central Excise refused to grant such registration unless the petitioner obtained a "No Objection Certificate" from the respondents. Though the petitioner applied for such, "No Objection Certificate" from the respondents No. 1 to 3, such application was neither granted nor rejected. The petitioner was, therefore, constrained to approach this court by way of the present petition.

7. The short question that arises for consideration in the present case is, whether the respondent Central Excise authorities are justified in calling upon the GIDC not to register any transfer of the subject plot without production of an NOC from

the Central Excise authorities.

8. From the facts as emerging from the record, it appears that M/s. Mahalaxmi Processors was initially carrying on the activities of an EOU on the subject plot on the strength of a lease deed executed by and between Mahalaxmi Processors and M/s. Amitex Silk Mills Private Limited. Various demands were raised against M/s. Mahalaxmi Processors during the period from 2003 to 2008. It appears that the respondent authorities at the relevant time have not taken any action for recovering the same from M/s. Mahalaxmi Processors. Much belatedly, on 11.12.2013 a notice of demand to defaulter came to be issued to M/s. Mahalaxmi Processors raising a demand of Rs. 1,87,05,178/-. In connection with the said demand, the Superintendent of Central Excise has informed the GIDC not to change the ownership of the said premises unless a "No Objection Certificate" is issued by the office.

9. As is evident from the facts noted hereinabove, the subject plot stood in the name of Shri Tehelram Thakordas Arora in whose favour GIDC had executed a lease for a period of ninety nine years. Shri Tehelram Thakordas Arora, in turn transferred the subject plot in favour of the petitioner way back in August, 2007. GIDC permitted such transfer in favour of the petitioner and accordingly, the plot stood transferred in favour of the petitioner and Shri Tehelram Thakordas Arora ceased to have any right, title or interest in the said property. Insofar as M/s. Mahalaxmi Processors is concerned, nothing has been brought on record by the respondents to establish that M/s. Mahalaxmi Processors had any right, title or interest in the plot in question.

10. Section 11 of the Central Excise Act, 1944 on the basis of which the respondents seek to enforce a condition for obtaining NOC from the Department prior to transfer of ownership of the subject plot provides for "Recovery of sums due to Government" and reads thus:

"11. Recovery of sums due to Government.--(1) In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder including the amount required to be paid to the credit of the Central Government under Section 11-D, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums may deduct or require any other Central Excise Officer or a proper officer referred to in Section 142 of the Customs Act, 1962 (52 of 1962) to deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control or may be in the hands or under disposal or control of such other officer, or may recover the amount] by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue:

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.

(2)(i) The Central Excise Officer may, by a notice in writing, require any other person from whom money is due to such person, or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held, or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in a case where the person to whom a notice under this sub-section has been issued, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be a person from whom duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or the rules made thereunder have become due, in respect of the amount specified in the notice and all the consequences under this Act shall follow."

11. Sub-section (1) of section 11 of the Act envisages attachment and sale of excisable goods belonging to a person from whom any duty or other sums of any kind payable to the Central Government under any of the provisions of the Act or the rules made thereunder. In case such amount is not recoverable in the above manner the subsection further provides for issuance of a certificate and sending the same to the Collector to recover such amount as an arrear of land revenue. The proviso thereto provides for attachment and sale of all excisable goods,

materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of a person to whom the business or trade either wholly or in part of the defaulter is transferred. Thus, for the purpose of resorting to the provisions of section 11 of the Act, the first condition precedent is that the properties described therein must belong to the defaulter. To take recourse to the proviso to sub-section (1) of section 11 of the Act, the business or trade of the defaulter should either wholly or in part be transferred. It is the case of the respondents that Shri Tehelram Arora was one of the Directors of M/s. Amitex Silk Mills Private Limited and that the Directors of M/s. Mahalaxmi Processors and M/s. Amitex Silk Mills Private Limited were common. Be that as it may. As to whether Shri Tehelram Thakordas Arora had any interest in M/s. Amitex Silk Mills Private Limited would not have any bearing on the merits of the present case, inasmuch as there is nothing on record to indicate that M/s. Mahalaxmi Processors has any existing right, title or interest in the subject property. Having regard to the fact that the subject property was not of the ownership of M/s. Mahalaxmi Processors; it is evident that the basic requirement for resorting to the provisions of sub-section (1) of section 11 of the Act is not satisfied. Moreover, what has been transferred in favour of the petitioner is the subject plot and not the business of M/s. Mahalaxmi Processors. Under the circumstances, assuming for the sake of argument that M/s. Mahalaxmi Processors has any interest in the subject plot, even then the requirements of the proviso to sub-section (1) of section 11 of the Act are not satisfied.

12. Another notable aspect of the matter is that at the relevant time, when the dues of M/s. Mahalaxmi Processors had accrued, no action appears to have been taken in respect thereof. As held by this court in Valley Velvet Pvt. Ltd. v. Union of India (supra) when no time limit is prescribed for exercise of a power under a statute, it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. From the statement produced by the respondents, it is evident that a charge is sought to be created on the subject plot in respect of the dues of the period 2003 to 2008 in the year 2013, after a considerable delay, which by no stretch of imagination can be said to be a reasonable time. Therefore, the impugned action of the respondents is also barred by limitation. Moreover, on a perusal of the notice dated 11.12.2013 it appears that a huge demand of Rs. 1,87,05,178/- has arisen on 25.2.2008, which is subsequent to the date of transfer of the subject plot in favour of the petitioner. It cannot be gainsaid that when the subject plot stood transferred in favour of the petitioner in August 2007, subsequent dues of M/s. Mahalaxmi Processors cannot be sought to be recovered from the petitioner, more particularly, when none of the requirements of section 11 of the Central Excise Act are satisfied in the present case. Also as rightly submitted by the learned counsel for the petitioner, section 11E of the Act was brought on the statute book long after the subject plot stood vested in the petitioner and hence, would have no applicability to the facts of the present case. Considering the case from any angle, the respondent Central Excise authorities, do not have any authority in

law to direct the fourth respondent GIDC not to register the transfer of change of ownership without obtaining an NOC from the Central Excise authorities. Consequently, the impugned letter dated 20.5.2014 issued by the Superintendent of Central Excise, Range III, Division V, Surat -I to Regional Manager, GIDC requesting him not to change the ownership of the said premises, that is, Plot No. 821 Road No. 8, GIDC Sachin, Surat, in any other name unless "No Objection Certificate" is issued by that office so as to enable that office to recover huge Government dues outstanding against M/s. Mahalaxmi Processors, cannot be sustained.

13. Insofar as the challenge to the notice dated 11.12.2013 is concerned, the same is addressed to M/s. Mahalaxmi Processors and does not in any manner prejudice the case of the petitioner. Under the circumstances, as rightly submitted by the learned counsel for the respondents, the petitioner has no locus standi to challenge the same.

14. In the light of the above discussion, the petition succeeds and is, accordingly, allowed in the following terms:

"The impugned communication dated 20.5.2014 addressed by the Superintendent of Central Excise, Range III, Division V, Surat -I to Regional Manager, Gujarat Industrial Development Corporation is hereby quashed and set aside. Consequently, the GIDC would no longer be justified in imposing condition No. 21 in the communication dated 1.9.2015 and shall, therefore, effect the change in the constitution of the Board of the petitioner company without insisting upon compliance of the condition of obtaining NOC from the Central Excise Department. Rule is made absolute accordingly to the above extent with no order as to costs."